OB

(2)

8-8-07

No. 07-33

IN THE
SUPREME COURT OF THE UNITED STATES

JON OZMINT, Director,
South Carolina Department of Corrections,

Petitioner,

versus

JOSEPH LEE ARD,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

WILLIAM N. NETTLES*
Sanders & Nettles, LLC
Post Office Box 12005
Columbia, SC 29211
(803) 779-9966

CHRISTOPHER SEEDS
Cornell Law School
Myron Taylor Hall, Room 103
Ithaca, NY 14853
(607) 255-3805

* *Counsel of Record*

Attorneys for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

I. WHETHER THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED *STRICKLAND v. WASHINGTON* IN CONCLUDING THAT TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT, WHERE COUNSEL, AWARE THAT THE STATE'S FORENSIC GUNSHOT RESIDUE TEST RESULTS WERE CRITICAL TO THE CASE, MADE NO ATTEMPT TO INTERVIEW THE STATE'S EXPERT PRIOR TO TRIAL, DID NOT INDEPENDENTLY INVESTIGATE THE TEST RESULTS, DID NOT CROSS-EXAMINE THE EXPERT AFTER HIS TESTIMONY SUGGESTED IT WOULD BE BENEFICIAL, AND CONSEQUENTLY FAILED TO INFORM THE JURY THAT THE TESTS WERE CONSISTENT WITH MR. ARD'S DEFENSE, NOT DISPOSITIVE DISPROOF OF IT.

II. WHETHER THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED *STRICKLAND v. WASHINGTON* IN FINDING, WHERE THE PROSECUTION POSITED THE UNCHALLENGED AND UNEXPLAINED GUNSHOT RESIDUE TEST RESULTS AS PIVOTAL, AND OTHER EVIDENCE DID NOT POINT STRONGLY TO MURDER, THAT BUT FOR COUNSEL'S ERRORS IT WAS REASONABLY PROBABLE THAT THE JURY WOULD HAVE CONVICTED MR. ARD OF INVOLUNTARY MANSLAUGHTER, NOT MURDER.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATION TO OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. The Supreme Court of South Carolina's Ruling 3
   A. Finding Deficient Performance 4
   B. Finding Prejudice 7
II. The Relevant Trial Evidence 8
   A. The Shooting 8
   B. The Gunshot Residue Testing 11
   C. The Deputy Solicitor's Summation 12
III. The Relevant Evidence from the Post-Conviction Proceedings 13
   A. Powell's Testimony 13
   B. Trial Counsel's Testimony 14

REASONS THE PETITION SHOULD BE DENIED 16

I. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED *STRICKLAND* IN CONCLUDING THAT PROBATIVE EVIDENCE SUPPORTS THE POST-CONVICTION COURT'S DETERMINATION THAT TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 17

   A. The Supreme Court of South Carolina Properly Applied *Strickland* in Finding Deficient Performance 17
   B. The Supreme Court of South Carolina Properly Applied *Strickland* in Finding Prejudice 22

II. THE PETITION MISCHARACTERIZES THE RECORD 25

CONCLUSION 26

TABLE OF AUTHORITIES

Federal Cases:

Arizona v. Fulminante, 499 U.S. 279 (1991) 23

Banks v. Dretke, 540 U.S. 668 (2005) 23

Griffin v. Warden, 970 F.2d 1355 (4th Cir. 1992) 23

Massaro v. United States, 538 U.S. 500 (2003) 19

Rompilla v. Beard, 545 U.S. 374 (2005) 17, 20, 24

Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004) 22

Strickland v. Washington, 466 U.S. 688 (1984) ..... *passim*

Troedel v. Wainwright, 667 F.Supp. 1456 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1987) 5, 18, 19

United States v. Bagley, 473 U.S. 667 (1985) 23

United States v. Cronic, 466 U.S. 648 (1984) 19

Wiggins v. Smith, 539 U.S. 510 (2003) 17, 21, 22

State Cases:

Ard v. Catoe, 642 S.E.2d 590 (S.C. 2007) ..... *passim*

Burnett v. State, 576 S.E.2d 144 (S.C. 2003) 3

Caprood v. State, 525 S.E.2d 514 (S.C. 2000) 3

Ingle v. State, 560 S.E.2d 401 (S.C. 2002) 5

Nance v. Ozmint, 626 S.E.2d 878 (S.C. 2006) 19

Pierce v. State, 526 S.E.2d 222 (S.C. 2000) 4, 16

Von Dohlen v. State, 602 S.E.2d 738 (S.C. 2004) 20

Webb v. State, 314 S.E.2d 839 (S.C. 1984) 3, 16

Whiteside v. Cherokee County Sch. Dist. No. One, 428 S.E.2d 886 (S.C. 1993) 2

Statutes:

28 U.S.C. § 1257(a) 1

Rules:

Sup. Ct. R. 10 (West 2005) 3

Other Sources:

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (reprinted in 31 Hofstra L. Rev. 913 (2003)) . . 17, 21

CITATION TO OPINIONS BELOW

The decision of the Supreme Court of South Carolina, *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007), is attached as Appendix I to the Petition for Writ of Certiorari. The Order of the Supreme Court of South Carolina denying the petition for rehearing is attached to the Petition as Appendix II.

JURISDICTION

The Supreme Court of South Carolina entered its judgment on March 5, 2007, and denied the petition for rehearing on April 4, 2007. Petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

This case involves the Fourteenth Amendment to the United States Constitution, which applies the Sixth Amendment to the states, and which provides, in relevant part, that "[n]o state may deprive any person of life [or] liberty ... without due process of law."

STATEMENT OF THE CASE[1]

Two state courts have reviewed Mr. Ard's case under *Strickland v. Washington*, 466 U.S. 688 (1984). Both found, in straightforward application of this Court's precedent, that trial counsel's performance was deficient and that it was prejudicial, in

---

[1] Respondent cites the Record on Appeal (App.), the Petition for Writ of Certiorari, docketed July 9, 2007 (Pet.), and the slip opinion of the Supreme Court of South Carolina in *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007), which is attached to the Petition for Certiorari as Appendix I (Slip op.).

violation of the Sixth and Fourteenth Amendments to the United States Constitution. The state post-conviction court, following an evidentiary hearing, granted Mr. Ard a new guilt-innocence trial. The Supreme Court of South Carolina, as it must upon finding probative evidence in the record that supports the post-conviction court's ruling, affirmed. *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007).[2]

Mr. Ard's trial involved a closely contested battle over whether he was guilty of involuntary manslaughter or capital murder. Charged in the shooting deaths of his pregnant girlfriend, Madalyn Coffey, and their unborn fetus, Ard never denied his involvement, describing the shooting as a spontaneous series of events that began when Coffey, believing Ard was having an affair, grabbed his gun and threatened to shoot herself, and which ended in a tragic accident as he and Coffey struggled over the hair-trigger gun. The prosecution in this case focused centrally on forensic evidence, and the Commissioner's appeal concerns the critical piece – the results of the State's testing for gunshot residue on samples taken from Ms. Coffey's hands. At trial, the state forensic experts reported that the gunshot residue tests were negative, that the samples contained "no gunshot residue." In closing argument, the state prosecutor (solicitor) argued the "no gunshot residue" finding conclusively disproved Ard's accident account. The jury, after asking the court to re-read the definition of involuntary manslaughter, convicted Ard of capital murder.

---

[2] The state post-conviction court also granted sentencing relief on a separate ground. App. 4668, 4673. The Supreme Court of South Carolina, affirming the post-conviction court's determination that Ard was entitled to a new guilt-innocence trial under *Strickland*, did not address the post-conviction court's grant of sentencing relief. 642 S.E.2d at 594 n.9 (Slip op. at 21 n.9) (citing *Whiteside v. Cherokee County Sch. Dist. No. One*, 428 S.E.2d 886 (S.C. 1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive)).

The state supreme court broke no new ground in finding counsel performed deficiently under *Strickland* where counsel, well aware that the state's forensic gunshot residue test results were critical to the state's case, made no attempt to interview the state gunshot residue expert (the key witness) prior to trial, did not independently investigate the test results, did not cross-examine the expert after his direct testimony suggested that cross-examination would be beneficial, and consequently failed to communicate to the jury that – unbeknownst to trial counsel and contrary to the solicitor's closing argument – the state's gunshot residue results (reported in conclusory fashion as "no gunshot residue") were actually consistent with Ard's testimony. Nor did the state supreme court break new ground under *Strickland* in finding, in this case where the other evidence did not point strongly to capital murder and the prosecution posited the gunshot residue test result as the central evidence, that but for counsel's errors it was reasonably probable that the jury would have convicted Mr. Ard of involuntary manslaughter, not murder.

The Commissioner's petition seeks review of a straightforward *Strickland* ruling by the state supreme court. The petition presents no "compelling reasons" that merit this Court's review. Sup. Ct. R. 10 (West 2005).

I. The Supreme Court of South Carolina's Ruling

Under state law in South Carolina, the ruling of a post-conviction court is entitled to great deference. *See Burnett v. State*, 576 S.E.2d 144 (S.C. 2003); *Caprood v. State*, 525 S.E.2d 514 (S.C. 2000). A post-conviction court's ruling must be upheld by the appellate court if there is any probative evidence in the record to support it. *Webb v. State*, 314 S.E.2d 839 (S.C. 1984); *Caprood*, 525 S.E.2d at 517. The appellate court will

only reverse the post-conviction determination when it is controlled by an error of law. *Pierce v. State*, 526 S.E.2d 222, 225 (S.C. 2000).

Applying the state law standard of review and this Court's ineffective assistance of counsel jurisprudence following from *Strickland v. Washington*, *see* 642 S.E.2d at 596-97 (Slip op. at 10-11) (discussing *Strickland* principles)), the Supreme Court of South Carolina ruled that the post-conviction court's determinations of deficient performance and prejudice were "well supported by the evidence presented at the PCR hearing." 642 S.E.2d at 594 (Slip op. at 7); *see id.* at 597 (Slip op. at 12) (finding "respondent proved that trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence" and "the evidence at the PCR hearing establishes that if they had made an appropriate challenge, it would have had a significant impact on the guilt phase of this case"); *id.* at 599 (Slip op. at 15) (finding "ample probative evidence to support the PCR court's factual findings of deficient performance compelling us to affirm . . . without counsel's errors, there is a reasonable probability the jury would have had a reasonable doubt as to whether respondent was guilty of murder") (citing *Strickland*).

A. Finding Deficient Performance

The state supreme court focused on a composite of failures by counsel to investigate, evaluate, and challenge the state's gunshot residue test results – any one of which would have allowed counsel to show that the gunshot residue test results did not negate Ard's testimony. Despite knowing "how crucial the gunshot residue evidence was to [Ard]'s defense," *id.* at 597 (Slip op. at 12), counsel did not discuss the gunshot residue evidence "at all" with State Law Enforcement Division (SLED) Agent Joseph Powell, who reported the negative result. *Id.* at 598 (Slip op. at 13). Agent Powell testified

during the post-conviction proceedings that, if asked before trial or at trial, he would have informed counsel that the results were, in fact, "consistent with gunshot residue and could have come from [Ms. Coffey] handling a weapon." *Id.* at 595 (Slip op. at 8). A pretrial discussion with Powell, the court reasoned, "would have given counsel an opportunity to prepare an effective cross-examination which would have resulted in Powell testifying that the evidence was not inconsistent with Coffey handling the gun." *Id.* at 598 (Slip op. at 13). The court found counsel "were unreasonable in not exploring the gunshot residue evidence with Powell prior to trial." *Id.* (citing *Troedel v. Wainwright*, 667 F.Supp. 1456 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1987)).

"Even at trial," the state supreme court emphasized, "Powell's testimony clearly alluded to some uncertainty in the evidence," when he stated that there were "several particles which were *very interesting*, but there was not any *or enough* material for us to able to call gunshot residue; thus [Coffey] ha[d] no gunshot residue on her hands." *Id.* (emphasis in opinion). If they had asked Powell to explain these statements, the court held, "Powell would have filled the 'hole' in the defense." *Id.* Counsel's decision not to cross-examine the state gunshot residue witnesses because counsel 'didn't want to draw any more attention to it' since they 'had no response to what they had to say,'" *id.* at 595-96 (Slip op. at 9) (quoting trial counsel evidentiary hearing testimony), was "not an objectively reasonable strategy." *Id.* at 598 (Slip op. at 13) (citing *Ingle v. State*, 560 S.E.2d 401, 405 (S.C. 2002) (applying *Strickland*)).

Further, after receiving the state's "no gunshot residue" test result, which counsel knew "considerably undermined [Ard's] account of the incident," they spoke only with former SLED Agent Michael Avery, who while at SLED had supervised Powell's tests of

the gunshot residue for Ard's case. *Id.* at 597-98 (Slip op. at 12). Although Avery was no longer working for the state forensic laboratory, the court recognized that "the PCR court correctly found that Avery was not *an independent* expert because he had reviewed the gunshot residue report in his role as Powell's supervisor." *Id.* at 597 (Slip op. at 12) (emphasis in original). "In order for Avery to question Powell's findings," the court continued, "he would have implicitly had to have cast doubt on his own oversight of that very same analysis." *Id.* Noting there was no evidence that Avery "did, in fact, render a biased opinion," the court agreed with the state post-conviction court that "it was unreasonable for counsel to choose Avery as their only expert on the critical gunshot residue analysis." *Id.* at 597-98 (Slip op. at 12); *see id.* at 597 n.15 (Slip op. at 23 n.15) ("Given [Avery's] previous involvement in the case while employed with SLED, any presumption about his objectivity is untenable."). The court pointed out that the state called Avery as a witness at trial, and the solicitor emphasized to the jury during both Avery's testimony and summation that Avery was hired by the defense and "nonetheless had confirmed Powell's conclusions." *Id.* at 598 (Slip op. at 13).

The state supreme court found the critical nature of the gunshot residue testimony highlighted by the post-conviction testimony of trial counsel. *Id.* at 595 (Slip op. at 8). And the court found that the prosecution's "heavy reliance in closing argument on the lack of gunshot residue further support[ed] how critical it would have been if counsel had elicited testimony from Powell that evidence was consistent with Coffey handling a gun." *Id.* at 598 (Slip op. at 13-14).[3] In conclusion, the court held that Ard "clearly showed that

---

[3] The court quoted this portion of the Deputy Solicitor's summation:

> [I]f there is no gunshot residue on her hands, as Joe Powell told you, then her hand wasn't on that gun when it went off. Her hand wasn't near that gun when it went off .... if

counsel could have established that while there was a scientific finding of 'no gunshot residue' there nevertheless was evidence consistent with (but not conclusive of) Coffey handling the gun[:] Had counsel elicited this testimony from Powell, the State would not have been able to attack the defense theory as convincingly as it did." *Id.* (Slip op. at 14).

B. Finding Prejudice

The state supreme court found that the prosecution's "heavy reliance" on the gunshot residue test results also "highlight[ed]" prejudice. *Id.* at 598 (Slip op. at 14). Further, the jury's request for clarification on the definitions of murder and involuntary manslaughter after an hour of deliberation, the court noted, showed this was not an "open-and-shut case of murder." *Id.* The court noted that "because the jury did have the option of involuntary manslaughter, it could have accepted [Ard]'s account and yet still found him criminally responsible for the victims' deaths." *Id.* at 598-99 (Slip op. at 14); *see id.* at 599 n.17 (Slip op. at 23 n.17) (explaining involuntary manslaughter charge that jury received). In addition, there was other evidence that the jury may have found that supported involuntary manslaughter, including "much testimony about drug use" (Ard testified that he had smoked "a joint" and was drinking at the time of the incident) and that "Ard carried a gun and that the gun was on the floor of the trailer before Coffey was shot." "Considering this evidence," the court found, "the jury could have believed [Ard]'s account and yet could have also decided that [Ard] "recklessly disregarded the safety of his pregnant girlfriend and unborn son, therefore allowing the jury to return a

---

> they can't discount Joe Powell, if they can't discount those tests, then they can't get past the fact that there is no residue and then everything else they have raised is absolutely irrelevant, everything.... They have got to-got to-discount the value of those tests.
>
> 642 S.E. 2d at 598 (Slip op. at 14).

verdict of involuntary manslaughter." *Id.*[4] The court clarified that its determination was based on "the evidence available at the time of trial." *Id.* at 599 (Slip op. at 15).[5]

II. The Relevant Trial Evidence

A. The Shooting

Ard was the only witness to the shooting. The only other person at the trailer where the shooting occurred was Jay Johns, a friend of Ard and Ms. Coffey's. Ard's testimony and Johns' testimony about the events leading up to the shooting and the shooting itself do not conflict. On the evening of April 22, 1993, Ard visited Johns at John's new trailer. App. 2214. Johns was involved in a troubled relationship with Marie

---

[4] The state supreme court dissenting opinion disagrees with the PCR court's finding of deficient performance and prejudice. 642 S.E.2d at 599 (Slip op. at 16) (Toal, C.J., dissenting) ("In my opinion, Ard's trial counsel adequately investigated the issue of gunshot residue on the victim's hands and their failure to cross-examine the State's gunshot residue expert was neither deficient nor prejudicial to Ard."). In the dissent's view, Ard's counsel "sufficiently dealt" with the "adverse [gunshot residue] evidence" at trial by challenging the *collection* of the evidence. *See id.* at 599-600 (Slip op. at 16). In the dissent's view, the court engaged in "rank speculation" when it found that Avery was not "independent" simply based on his prior involvement with the testing. His lack of qualification therefore, the dissent argues, is an "assumption" that "does not support the majority's conclusion that selection of this expert by counsel was unreasonable." *Id.* at 600 (Slip op. at 17). The dissent also faults the majority for relying on the ABA norms because the court had never previously "adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina." *Id.* at 600 n.19 (Slip op. at 24 n.19). Finally, the dissent argues there was no prejudice because the state presented twenty witnesses amounting to "other overwhelming evidence" supporting conviction. Id. at 601 (Slip op. at 18) (failing to describe what evidence is overwhelming). The dissent acknowledged, however, that "the State emphasized the lack of gunshot residue in its closing argument." *Id.* at 601 (Slip op. at 18).

[5] The post-conviction court in applying *Strickland* found deficient performance and prejudice on substantially the same grounds as the state supreme court. In addition to the facts pointed to by the state court, the post-conviction court noted that counsel was also deficient in failing to recognize a discrepancy between the stated result of no gunshot residue and a SLED worksheet that noted the presence of two unique particles of gunshot residue. App. 4656; *see* App. 4657 ("In light of defense counsel's theory, the SLED reports should have been thoroughly investigated and vigorously challenged. Despite having such a pivotal role in defense counsel's theory of the case, the discrepancies in the SLED reports were not discovered or exploited."). The post-conviction court also identified more specific ways in which the cross-examination of Powell could have assisted the defense: for instance, counsel never asked Powell about the fact that a preliminary test for gunshot residue provided a strong enough indication that SLED thought it warranted SEMS testing, which is more involved and time consuming. App. 4658, 4663. On prejudice, the post-conviction court similarly found that "[d]efense counsel's failure to refute gunshot residue evidence transformed an arguable case into a clear case. The prosecution's guilt-phase closing in and of itself made the presence or absence of gunshot residue on Ms. Coffey's hands critical to Mr. Ard's defense. . . ." App. 4663-64.

Sprouse Johns, who was friendly with Ard's girlfriend, Madalyn Coffey. App. 1606, 1629. Ard told Johns he had seen Marie and Madalyn the day before at a friend's house and that they were staying at a motel. App. 2214-15 (Ard testimony); *see* App. 1630 (Johns testimony). Johns wanted to talk to Marie and asked Ard to go with him. App. 1606, 2215. Ard agreed. App. 2215. In the motel parking lot, they saw Marie and Madalyn in a car with Johns' daughter. App. 1673, 2216. They went back to the motel room, and as Johns and Marie yelled at each other in the main room, Ard and Coffey spoke in the bathroom, quietly, and she was crying. App. 1632, 2217, 2219. Madalyn, who was pregnant, suspected Ard was having an affair. App. 2218.[6]

After a half hour, Johns wanted to leave, and as Ard and Madalyn kissed goodbye, she asked to come with him. App. 1633, 2219. Ard agreed, and the three went back to the mobile home in Johns' car. App. 1633, 2219. Johns drove, a friend who stopped by the motel before they left rode in the passenger seat on part of the trip, and Ard and Madalyn sat in the back – even after they dropped the friend off, hugging and kissing as Ard tried to "reassure her everything was okay." App. 1634-35, 2220.

At the trailer, Madalyn sat on the couch. Johns went in the kitchen, and Ard sat down on the floor near the couch. App. 2222. His revolver, which he carried a lot, was

---

[6] Ard was twenty years old. Ms. Coffey was seventeen. They met in February of 1992 at a shopping mall in Columbia, South Carolina. App. 2204. As Ard recalled, "she was outgoing and carefree and spoke what was on her mind." App. 2204. As Ard described, Madalyn was the first "girlfriend that I really cared about":

> It's hard to describe. I mean, she'd come in the room and it would just brighten the whole room up. We just loved each other. I could talk to her and we just got along real good. We just spent a very lot of time together. She always came over to my house and she would stay there with me and my mother or I would get a motel room and stay at a motel room. We used to talk about all kinds of things.

App. 2204-05, 2206. In August of 1992, Madalyn became pregnant. App. 2206. Ard was happy and excited. App. 2207. Friends could see this. App. 1624, 2128, 2130, 2188. In preparation, he purchased maternity clothes. App. 1624, 2208. They planned to get married after the baby was born. App. 2211. Madalyn's mother kicked Madalyn out of the house after she became pregnant, and Madalyn and Ard stayed by turns at Ard's mother's house, at motels, and in a trailer with friends. App. 2236, 2239, 2244.

next to him on the floor near the sofa where Madalyn was sitting. App. 2222, 2254.[7] Johns rolled a joint in the kitchen, which he and Ard smoked. App. 1612, 2224. Afterward, Johns went outside. App. 1613. Ard turned the stereo on and sat down on his knees, drinking a beer, on the floor next to Madalyn. App. 2224. Madalyn asked him what he was going to do. App. 2225. Ard said he was going back to Atlanta. App. 2225. Madalyn asked if she could go with him, Ard said no, and Madalyn got upset. App. 2225. She told him she thought he was going to Atlanta to pursue an affair with another girl. App. 2227, 2256. She said she didn't love him and that he didn't love her and the baby. App. 2227. "We might as well be dead," she said. App. 2227. And she picked up his gun from the floor and pulled back the hammer. App. 2227. Ard told her she was acting crazy. App. 2227. He said "give me the goddamn gun, Madalyn." He reached up to grab the gun from Madalyn, his hand falling around the cylinder gap, Madalyn turned, and the gun went off.[8] App. 2227-28, 2260. Madalyn fell over, the gun fell to the floor. App. 2228, 2267. The gunshot wound to Madalyn's head was fatal. Moments later, Madalyn's and Ard's unborn fetus died from lack of oxygen. App. 2015.

Johns testified that when he heard a popping sound, he returned to the trailer, exchanged words with Ard, and Ard looked freaked out. App. 1614-17, 1635-36. Ard said to Johns, "Oh, God, I think Madalyn is dead," and told him to call 911. App. 2228, 2263; *see* App. 1615-1616. Then he ran. App. 2228, 1618.

---

[7] Defense counsel introduced testimony that Ard frequently carried a gun. *See* App. 2223. Counsel also attempted at one point to introduce testimony that Ms. Coffey frequently picked up Ard's gun. App. 2115-16, 2139. In response to the State's objection, the trial court suggested that counsel recall the witness at a later time once the relevance of the testimony had been established, App. 2117, 2140, but trial counsel never did. The PCR court found that counsel's failure to recall the witness was deficient performance under *Strickland*, but not prejudicial. App. 4659.

[8] The gun is a Charter Arms Bulldog Pug, a .44 caliber revolver. App. 1961, 1964. The trigger weight with the hammer pulled back is 3 to 3 1/4 pounds—what ballistics experts and others refer to as a "hair trigger," requiring a very light touch to fire. App. 1962, 1966.

Ard got in his car and drove to Atlanta. App. 2230. Three tear-filled and sleepless days later, App. 2181 (witness testimony, describing Ard in Atlanta), Ard returned to turn himself in, and his mother, father, and two brothers picked him up at the bus station in Augusta. App. 2230. They then took him to the office of an attorney in Columbia, who had made arrangements for Ard to present himself to the Lexington County Sheriff's Department. App. 2232. Ard passed out in the attorney's office and woke up in the intensive care unit of Lexington County Hospital. App. 2233; *see* App. 2277-85 (*in camera* testimony of Jack Swerling, Esq.). Upon release from the hospital, Ard turned himself in to the Lexington County Sheriff's Department. App. 2233.

B. The Gunshot Residue Testing

The State called three South Carolina Law Enforcement Division (SLED) Agents to testify about the gunshot residue tests. Two types of gunshot residue samples were taken from Ms. Coffey's hands: particle lift samples for use with a scanning electron microscope (SEMS) and nitric acid swabs for use with atomic absorption (AA) testing. Agent Powell testified that because the AA samples, used as a "screening" test, gave the trace lab scientists "an indication" that there was gunshot residue, the scientists proceeded to test the SEMS samples. App. 1939. In performing the tests, Powell testified that he found "several particles which were very interesting, [but] there was not enough of any or enough material for us to able to call gunshot residue; thus, she has 'no gunshot residue' on her hands." App. 1940. The State also called former SLED Agent Michael Avery, the Trace Evidence Department Supervisor who had supervised Powell's work. App. 1919. Avery testified that he still confirmed "the conclusion of the test results, which was no gunshot residue." App. 1921. The State also called SLED Agent

John Barron, who collected the data from the scanning-electron microscope and gave it to Agent Powell for analysis. App. 1927. Counsel did not cross-examination any of the SLED witnesses concerning the gunshot residue test conclusions.[9] The gunshot residue test evidence was the only evidence the state presented, alleging facts that countered Mr. Ard's account, that trial counsel did not dispute.[10]

C. The Deputy Solicitor's Summation

When the deputy solicitor delivered the State's summation, he posited Powell's gunshot residue findings as the critical element to the State's case:

> Why are these [the GSR samples] so important? BECAUSE IF THERE IS NOT GUNSHOT RESIDUE ON HER HANDS, AS JOE POWELL TOLD YOU, THEN HER HAND WASN'T ON THAT GUN WHEN IT WENT OFF. HER HAND WASN'T NEAR THAT GUN WHEN IT WENT OFF. HER HANDS WERE SOMEWHERE ASIDE FROM ON THE GUN. THAT'S WHY THEY ARE SO IMPORTANT. They can't attack Joe Powell. . . . [I]f the findings from these [GSR samples] are correct, then the only thing they can do is attack the way it's collected. . . . [I]f they

---

[9] After Ard testified, the State recalled Agent Powell to testify that a gun leaves residue on the hand of one who fires it, and may in certain situations also leave tattooing, stippling, and other injuries. App. 2403-05. Defense counsel then asked Powell about how a breeze can blow gunshot residue particles off someone's hands. But counsel did not ask Powell about his determination that the victim's hands had "no gunshot residue." App. 2406-07. Similarly, counsel asked Avery only about how fingerprinting would interfere with the quality of gunshot residue samples taken from a subject's hands. App. 1921-24. This line of questioning – focused on the validity of the *collection* of the SEMS and AA samples – was consistent with defense counsel's focus throughout trial on the collection of evidence at the scene. Defense counsel never challenged the legitimacy of the SLED gunshot residue test conclusions.

[10] At trial, the State called witnesses to testify about threats Ard allegedly made toward Ms. Coffey, *see* App. 1652 (testimony of Marie Sprouse Johns); App. 1721 (testimony of Lisa Madden); App. 1736 (testimony of Steven Bishop), which defense counsel countered witnesses who either refuted the testimony of the State witnesses (Guy King testified he was present on the occasion during which Marie Sprouse testified that she witnessed a threat; King said that he heard no threat and that Sprouse was not actually present, App. 2121-23) or testified that they had never heard Ard threaten Ms. Coffey (Tara Edwards, App. 2137; Brett Turner, App. 2128; Jerry Logue, App. 2162; and Robert Baggett, App. 2130). The State also called witnesses who testified about the investigation of the crime scene. *See* App. 1532 (testimony of Ira Spann); App. 1820 (testimony of Joe Brown); App. 1825 (testimony of Judy Fallaw); App. 1882 (testimony of Billy Allen). This included testimony about the collection of gunshot residue samples. *See* App. 1777 (testimony of Charles Catoe); App. 2407 (testimony of Jake Knotts). Defense counsel countered that testimony with cross-examination of Agent Catoe, and by calling its own crime scene expert (*see* App. 2323) and a mechanical engineer (*see* App. 2300), who described how the trajectory of the bullet that killed Ms. Coffey supported Ard's testimony. Other testimony by State witnesses concerned the medical explanation of Ms. Coffey's and the fetus' death (*see* App. 2008) and Mr. Ard voluntarily turning himself in to Lexington County (*see* App. 1767), but did not pertain to the shooting incident itself.

> can't discount Joe Powell, IF THEY CAN'T DISCOUNT THOSE TESTS, THEN THEY CAN'T GET PAST THE FACT THAT THERE IS NO RESIDUE AND THEN EVERYTHING ELSE THEY HAVE RAISED IS ABSOLUTELY IRRELEVANT, EVERYTHING. The fact that Madalyn handles guns, it's irrelevant. There is no gunshot residue. The fact that the clothes aren't collected, it's irrelevant if there is no gunshot residue. The fact that the couch cushions are not collected, it's irrelevant if there is no gunshot residue. The blinds, the angle of the shot, whatever this thing here is, it's irrelevant, irrelevant if there is no gunshot residue. THEY HAVE GOT TO – GOT TO – DISCOUNT THE VALUE OF THOSE TESTS . . . NO GUNSHOT RESIDUE. NONE. What does that tell y'all? What does that tell y'all?
>
> App. 2471-75 (emphasis added).

Defense counsel raised no objection. The Solicitor's point was clear: the no gunshot residue finding conclusively disproved Ard's defense.

III. The Relevant Evidence from the Post-Conviction Proceedings

The post-conviction court heard testimony from four witnesses on matters concerning the gunshot residue testing: SLED Agent Joseph Powell; Robert White, a gunshot residue expert formerly of the West Virginia State Crime Lab; trial counsel John Earl "Jack" Duncan; and trial counsel Elizabeth Fullwood. The state supreme court's determination, like that of the post-conviction court, relied "almost exclusively" on Powell's testimony and that of trial counsel. *See* 642 S.E.2d at 599 (Slip op. at 15).[11]

A. Powell's Testimony

Powell testified in deposition that particles from the Coffey samples could have come from Ms. Coffey handling the gun – that it was "well within the realm of possibility." App. 3572. He confirmed this at the evidentiary hearing. Noting that

[11] White, who had reviewed the SLED gunshot residue report, the data sheets and photographs from the SLED scanning electron microscope, the SLED worksheets, and the deposition testimony of Powell prior to the post-conviction hearing, concluded that the SLED tests established the presence of gunshot residue. App. 3638-3639, 3641-3642, 3646. White also retested the SEMS samples, and reaffirmed that conclusion. App. 3638. Powell and White agreed that the SLED tests showed particles that were consistent with Ms. Coffey handling the gun. The post-conviction court focused on the points of the experts' agreement. *See* App. 4653-58, 4662-63.

gunshot residue may deposit in a number of ways, Powell stated that one way was handling a gun, App. 3793, and that the Coffey samples were consistent with that possibility. App. 3812 ("Is it [the test result] consistent with handling a weapon? Yes."). When Ard's post-conviction counsel asked Powell during the evidentiary hearing why he did not tell the jury what he meant when he said he found "interesting" particles, Powell responded that "unless the questions are being asked of me, I don't know that I can just interject that." App. 3807; *see* App. 3806. Powell said that if asked by defense counsel he would have explained that the "interesting particles" found on Ms. Coffey's hands were characteristic of gunshot residue and "could have come from handling a weapon." App. 3810; *accord* App. 3651-53, 3685 (testimony of White).[12] Powell also said he could *"rule out"* the possibility that Coffey's hand was in front of the barrel of the gun when it fired. App. 3812 (emphasis added).

B. Trial Counsel's Testimony

Trial counsel believed Mr. Ard's case provided significant reason to doubt guilt of intentional murder – significant reason to believe that as Ard described Ms. Coffey's death was an accident. Trial counsel recalled, "We thought we had a very good chance of prevailing – when I say prevailing, I mean getting something less than murder accompanied by aggravating circumstances in the guilt-innocence phase." App. 3736; *see* App. 3991 ("This was a defensible murder case."). Given what counsel perceived to be the integrity of Mr. Ard's account – Ard's account of the events was consistent from

[12] Agent Powell also stated that he was "incorrect" to say there was "no gunshot residue" in the samples taken from Ms. Coffey. App. 3577; *see* App. 3569-3570, 3572. Under current SLED protocol, Powell stated in deposition, the gunshot residue test results were "inconclusive." App. 3572. During the evidentiary hearing, Powell acknowledged a significant difference between a result reporting "inconclusive" and a result reporting "no gunshot residue": "inclusive" means "I'm not sure"; "[n]egative means it is not there." App. 3832-33.

the moment trial counsel met him in February of 1994 (*see* App. 3708, 3980) – counsel pursued an accident defense from early on. Ard's account was corroborated by much of what counsel found at the crime scene. *See* App. 3709-11. Defense counsel hired an expert to assess trajectory to prove that the angle of the gun was as Ard said; they hired a crime scene expert to assess the State's collection of evidence. App. 3710-11.

But SLED's reported finding of no gunshot residue on Ms. Coffey's hands (App. 3734, 3962; *see* Powell Deposition Exh. 6) created a "huge hole" in the defense. The report cut to what trial counsel Duncan identified as the "core issue" of the case: If Ms. Coffey picked up the gun, why didn't she have gunshot residue on her hands? App. 3712-3713. Counsel testified to the report's significance at the PCR hearing: "[T]he fact that there was not gunshot residue on the victim's hands just kind of blew the whole case out of the water and it made Jody out to be a liar, made our other experts out to be mistaken or for some reason less credible . . . It was a huge hole in the case." App. 3763-3764; *see* App. 3991.

When asked about attempts to hire a gunshot residue expert, counsel responded that they contacted Michael Avery, who supervised the gunshot residue testing of the samples in Ard's case at SLED. According to Duncan, in contacting Avery counsel "were trying to find out if we needed to hire anyone else [and] if there was anything there that we needed to investigate." App. 3750; *see id.* (testifying Avery was contacted "to let us determine whether or not we needed to hire anyone"); App. 3965 (counsel Fullwood recalling that they retained Avery "[t]o see if he could help us understand and explain the results of the gunshot residue tests SLED had conducted"). After Avery informed counsel that "there was nothing there for us to – that was useful to us," that he was

"satisfied with the results of this test," counsel left challenging the gunshot residue testing behind and explored other ways of explaining how Ms. Coffey could have handled the gun and yet have no gunshot residue on her hands, such as evidence collection. App. 3713-15, 3966.

Counsel Duncan explained that they chose not to cross-examine Powell to avoid bringing more attention to the gunshot residue test results. App. 3721. Nor did they speak with Powell before trial. After reviewing Powell's deposition statements asserting that the gunshot residue evidence was consistent with Coffey handling the gun, counsel lamented the failure to question Powell: "We didn't ask the questions and the answers would have helped us immensely. . . . If we had known enough or had done enough research to ask questions, we were just – we didn't ask the questions." App. 3724; App. 3746 ("[W]e had no reason to object [to the gunshot residue testimony] because we didn't know.").

REASONS THE PETITION SHOULD BE DENIED

The Commissioner argues three grounds for certiorari in this case. Each is unfounded. The state court decision is a straightforward application of *Strickland*. Moreover, throughout, the Commissioner fails to acknowledge that under state law, the appellate court must affirm the post-conviction court's ruling upon finding any probative evidence in the record to support it. *See Ard*, 642 S.E.2d at 596 (Slip op. at 10) (citing *Webb*, 314 S.E.2d at 839; *Pierce*, 526 S.E.2d at 225). The state supreme court correctly found, under *Strickland*, that there was probative evidence in the record to support the post-conviction court's grant of relief under the Sixth and Fourteenth Amendments.

I. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED *STRICKLAND* IN CONCLUDING THAT PROBATIVE EVIDENCE SUPPORTS THE POST-CONVICTION COURT'S DETERMINATION THAT TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Supreme Court of South Carolina Properly Applied *Strickland* in Finding Deficient Performance

To establish ineffective assistance of counsel, a defendant must first demonstrate that his attorney's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Objective review of counsel's performance must measure "reasonableness under prevailing professional norms" and must take into account "counsel's perspective at the time." *Id.* at 688, 689. In assessing the reasonableness of counsel's performance:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and *strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.* In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91 (emphasis added).[13] The state court did not misapply *Strickland*'s deficient performance prong. *See id.* at 690. The state court's finding of deficient performance is well based in the record.

---

[13] One source of prevailing professional norms for counsel in capital cases is the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003). *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). According to the Guidelines, defense has a duty to conduct an "independent investigation," and "with the assistance of appropriate experts" to "aggressively re-examine" the State's forensic evidence in full. Guideline 10.7 (reprinted in 31 Hofstra L. Rev. 913, 1020 (2003)).

Powell testified at deposition and during the evidentiary hearing that the gunshot residue tests, although in his view not positive for gunshot residue, showed particles characteristic of gunshot residue that were consistent with Mr. Ard's account that Ms. Coffey handled his gun. Powell stated further that if defense counsel had asked him whether the evidence was consistent with the victim handling the gun, he would have said yes. Counsel's failure to ask Powell these questions, either before or at trial, and their motivation at trial to avoid the issue altogether during cross-examination because they thought it would place more importance than there already was on the issue, resulted from their incomplete investigation of the gunshot residue analysis. *See* App. 3724.[14]

Reasonable professional judgment does not support the limitations counsel placed on its investigation. *See Strickland*, 466 U.S. at 690-91. The state supreme court cited one case finding capital defense counsel deficient under *Strickland* in very similar circumstances. *See* 642 S.E.2d at 597-98 (Slip op. at 11, 13) (citing *Troedel v. Wainwright*, 667 F.Supp. 1456 (S.D. Fla. 1986)).[15] *Troedel* supports the state court's determination. There, as here, the gunshot residue testing was "a most crucial aspect of the trial." *Id.* at 1461. There, as here, defense counsel testified "that he knew pretrial the issue would be critical." *Id.* There, as here, counsel failed to consult with or depose the

---

[14] Counsel admittedly did not know enough to ask questions of Powell – as Duncan said, "[W]e didn't ask the questions and the answers would have helped us immensely. . . . If we had known enough or done enough research to ask questions, we were just, we didn't ask questions." App. 3724.

[15] Petitioner argues *Troedel* is distinguishable as a case "based on a showing that testimony regarding the gunshot residue was either false or misleading," and that the state court's citation of the case "highlights the misapplication of federal law." Pet. at 18 n.6. Petitioner's characterization of *Troedel* is misleading. The district court in *Troedel* granted relief on three grounds: a *Brady* violation, the prosecutor's use of misleading evidence, *and* ineffective assistance of trial counsel under *Strickland*, finding counsel performed deficiently in failing "to investigate and consult with experts concerning the testimony about the gunpowder residue analysis." Troedel, 667 F.Supp. at 1460-61.

State's expert witness prior to trial. *Id.* And there, as here, "defense counsel himself had no special knowledge in th[e] field [of gunshot residue]." *Id.*

The only notable distinction between this case and *Troedel* is that in *Troedel* counsel did not consult with an expert, whereas here counsel talked curtly to Avery. But it was not reasonable to rely solely, as counsel did, on Mr. Avery's self-assessment as to his own work.[16] Counsel knew Avery supervised the gunshot residue tests taken from Ms. Coffey. App. 3713. At best, consulting Avery was only a reasonable first step to further investigation. In fact, that is how trial counsel Duncan viewed the contact – "to let us determine whether or not we needed to hire anyone." App. 3750. Stopping investigation of the state's gunshot residue testing after Avery told them that there was "nothing there for us – that was useful to us" – relying entirely on the test supervisor's self-assessment of his work – was not a reasonable basis upon which to forsake further investigation.[17]

---

[16] Similarly, it would not be reasonable, in investigating an ineffective assistance of counsel claim, to rely solely on prior counsel's self-assessment as to their own ineffectiveness. *Cf. Massaro v. U.S.*, 538 U.S. 500 (2003). In rejecting a rule under which a claim of ineffective assistance of counsel was defaulted if not raised on direct appeal, this Court explained that the rule, which conflicted with the rules of all but one other Federal Court of Appeals, was inefficient and awkward, in part, because "[o]n direct appeal it puts counsel into an awkward position vis-á-vis trial counsel. . . . trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence." *Id.* at 506.

[17] The Commissioner argues that "[t]he state court simply could not, under federal precedent, presume prejudice in connection with the allegation of ordinary counsel error, yet this court did." Pet. at 17, *see* Pet. at 19-20. The Commissioner cites to *United States v. Cronic*, 466 U.S. 648 (1984). It has never been argued in these proceedings that trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" to the extent that it made "the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659; *cf. Nance v. Ozmint*, 626 S.E.2d 878 (S.C. 2006) (finding complete breakdown of defense throughout guilt and sentencing phases of trial). And no state court ever considered the issue. What the Commissioner means to argue, it seems, is that consulting solely with Avery was a reasonable decision, and that the state court, in finding otherwise, was speculating as to (or "presuming") Avery's bias. But in the limited circumstances of this case, for the reasons discussed above, relying on Avery's self-assessment was unreasonable.

Counsel's pursuit of an "alternate way" of presenting the defense, Pet. at 40 – namely, challenging the validity of the *collection* of the gunshot residue – does not excuse their failure to fully investigate the gunshot residue testing. *See Rompilla*, 545 U.S. at 381-83, 388-89. Counsel's awareness that the gunshot residue testing was critical to the case made their responsibility to pursue investigation and to challenge Agent Powell's testimony "particularly pressing." *Id.* at 386.[18] Counsel's efforts to call an engineer to explain that the trajectory evidence supported Ard's testimony, to call a crime scene expert to challenge the collection of evidence, and to call a number of Ard's friends to testify that Mr. Ard's relationship with Ms. Coffey was not violent, do not absolve the failure to fully investigate the critical gunshot residue test results that they knew were central to the State's case. *See id.* at 381-83, 388-89; *Von Dohlen*, 602 S.E.2d at 743. In fact, counsel's efforts to find other ways to challenge what they believed was a complete lack of gunshot residue on Ms. Coffey's hands underscore the unreasonableness of their abandonment of any challenge to the testing itself. The time counsel spent trying to denigrate the credibility of the evidence collection and shows they viewed the forensic evidence as central. Failing to spend more time investigating the SLED testing was not a matter of trial tactics; it was misplaced reliance on Avery's self-assessment, not reasoned strategic judgment.

The Commissioner also argues that the South Carolina Supreme Court elevated the ABA Guidelines above the law – in effect, that the court found *per se* deficient

---

[18] In *Rompilla*, this Court found trial counsel provided ineffective assistance to a capital defendant, where, aware that the prosecution would seek the death penalty based on a prior conviction, they failed to examine the court file on the prior conviction; yet counsel had interviewed family members and had presented reports of three mental health experts. 545 U.S. at 388-89; *see Von Dohlen v. State*, 602 S.E.2d 738, 743 (S.C. 2004) (finding that despite "some effort" and investigation by counsel that "absence of crucial medical records and related information which existed at the time . . . prevented [testifying expert] from conveying an accurate diagnosis and explanation . . . to the sentencing jury").

performance for failure to "conduct thorough and independent investigations relating to the issues of both guilt and penalty" and "with the assistance of appropriate experts" to "aggressively re-examine" the State's forensic evidence (*see* Guideline 10.7, reprinted in 31 Hofstra L. Rev. at 1020). Pet. at 20. The state court did no such thing. The state court's opinion explains that this Court's precedent points to the Guidelines as "guides" (quoting *Strickland*, 466 U.S. at 688), which courts "may" use to "measure[]" the "reasonableness of counsel's conduct" (citing *Wiggins*, 539 U.S. at 524). 642 S.E.2d at 597 (Slip op. at 22 n.14). And that is how the court used them. Tellingly, the state court dissenting opinion does not argue the majority's application of the Guidelines violates this Court's precedent. *Id.* at 600 n.19 (Slip op. at n.19) (Toal, C.J., dissenting). Rather, the dissent simply objects that the ABA Guidelines had not to date been accepted in South Carolina. *Id.*

An attorney's strategic judgments can hardly be questioned – so long as they are based upon reasonable investigation. The Supreme Court of South Carolina did not make any new rules about what trial counsel must do. It found that a composite of failures by counsel amounted to deficient performance.[19] This reasoning is soundly rooted in *Strickland* and *Wiggins* and *Rompilla*. Question I of the Petition does not present an issue meriting the Court's review.

---

[19] The state supreme court did not find that asking only one expert, or such an expert as Avery, was *per se* unreasonable; nor did the state court find that it was unreasonable *per se* for counsel not to question the state's expert, here Powell, about the tests prior to trial, as petitioner suggests, *see* Pet. at 20. The state supreme court's finding of deficient performance is plainly based on the totality of counsel's deficient performance, *see* 642 S.E.2d at 597-98 (Slip op. at 12-14), as *Strickland* requires. 466 U.S. at 688.

B. The Supreme Court of South Carolina Properly Applied *Strickland* in Finding Prejudice

To show prejudice under *Strickland*, a party must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 446 U.S. at 694; *see Wiggins*, 539 U.S. at 534. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Strickland*, 446 U.S. at 694; *see Smith v. Mullin*, 379 F.3d 919, 929 (10th Cir. 2004) (a "reasonable probability" is "less than a preponderance of the evidence"). In assessing prejudice, defense counsel's cumulative performance is considered with the totality of the evidence. *Strickland*, 446 U.S. at 695.

The state supreme court set forth the *Strickland* definition of prejudice, 642 S.E.2d at 596 (Slip op. at 11), and addressed the impact of the totality of counsel's deficient performance errors in the context of the trial. *Id.* at 598-99 (Slip op. 14-15). The court recognized that this case involved an arguable defense at the guilt phase. It noted that trial counsel recognized how critical the gunshot residue test results were before trial, and counsel testified that knowing then what is known now regarding the consistency between Powell's findings and Ard's account would have made big difference. *Id.* at 595 (Slip op. at 8); *see* App. 3736, 3763, 3991; App. 3712-3713. The court also recognized that the Deputy Solicitor's summation posited the negative gunshot residue as central to the jury's decision on whether to convict. *Id.* at 598 (Slip op. at 14). Further, the jury note asking the trial court to reread the definition of involuntary manslaughter was indicative of the fact that the evidence against Mr. Ard on the murder charge was not overwhelming, and that a conviction on the lesser charge of involuntary manslaughter was a real possibility. *Id.* at 598-99 (Slip op. at 14). The court also pointed

to other evidence in the record, such as that regarding drug use contemporaneous to the incident and Ard's testimony that he had placed the gun on the floor, that might have led the jury to convict on involuntary manslaughter. *Id.* at 599 (Slip op. at 14); *id.* at 599 n.17 (Slip op. at 23 n.17).

The Commissioner faults the state court for focusing "myopically" on the deputy solicitor's summation. *See* Pet. at 23. The court did not focus on it "myopically," but it did focus on it, and appropriately so. *See Banks v. Dretke*, 540 U.S. 668, 700-01 (2005). In *Banks v. Dretke*, this Court found prejudice "marked" where the "prosecutor's . . . summation . . . left no doubt about the importance the State attached to [a witness's false] testimony," where because of the prosecutor's summation "the [witness's] testimony was the centerpiece of [the] prosecution's . . . case." *Id.* at 700, 701 (prosecutor urging witness's testimony was "of the utmost significance").[20] *See also Arizona v. Fulminante*, 499 U.S. 279, 297 (1991) (prosecution's emphasis on confession as foundation and "centerpiece" of trial "compelled" finding of not harmless error); *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992) (finding prosecutor's closing argument "demonstrates the narrow scope of the state's case" and *Strickland* prejudice). Here, the deputy solicitor's summation posited Powell's testimony as critical:

> Why are these [the GSR samples] so important? BECAUSE IF THERE IS NOT GUNSHOT RESIDUE ON HER HANDS, AS JOE POWELL TOLD YOU, THEN HER HAND WASN'T ON THAT GUN WHEN IT WENT OFF. HER HAND WASN'T NEAR THAT GUN WHEN IT WENT OFF. HER HANDS WERE SOMEWHERE ASIDE FROM ON THE GUN. THAT'S WHY THEY ARE SO IMPORTANT. They can't attack Joe Powell. . . . [I]f the findings from these [GSR samples] are correct, then the only thing they can do is attack the way it's collected. . . . [I]f they can't discount Joe Powell, IF THEY CAN'T DISCOUNT THOSE TESTS, THEN

[20] In *Banks*, this Court reviewed and found prejudice on a *Brady* claim. The *Brady* materiality standard, enunciated in *United States v. Bagley*, 473 U.S. 667 (1985), and the *Strickland* prejudice standard are the same. *See Bagley*, 473 U.S. at 682-83.

> THEY CAN'T GET PAST THE FACT THAT THERE IS NO RESIDUE AND THEN EVERYTHING ELSE THEY HAVE RAISED IS ABSOLUTELY IRRELEVANT, EVERYTHING. The fact that Madalyn handles guns, it's irrelevant. There is no gunshot residue. The fact that the clothes aren't collected, it's irrelevant if there is no gunshot residue. The fact that the couch cushions are not collected, it's irrelevant if there is no gunshot residue. The blinds, the angle of the shot, whatever this thing here is, it's irrelevant, irrelevant if there is no gunshot residue. THEY HAVE GOT TO – GOT TO – DISCOUNT THE VALUE OF THOSE TESTS . . . NO GUNSHOT RESIDUE. NONE. What does that tell y'all? What does that tell y'all?

App. 2471-75 (emphasis added). Defense counsel's failure to cross-examine Powell or present testimony to explain the gunshot residue test results was critical because the summation left the jury with the mistaken view that the gunshot residue evidence destroyed Mr. Ard's case, when in fact it was consistent with it.

Both trial counsel recalled that this was a close case, an arguable, defensible case that turned on the forensic evidence. *See* App. 3736, 3763, 3991. The "core issue," counsel testified, was the gunshot residue findings. App. 3712-13. Yet that was the evidence that the defense failed to counter. *See supra* n.10. When the State presented the critical testimony concerning the gunshot residue test – Powell's testimony that there was absolutely no gunshot residue in the samples taken from Ms. Coffey's hands – the defense did not respond. None of counsel's actions diminished the devastating impact of Powell's unchallenged testimony at trial. *See Rompilla*, 545 U.S. at 387.

The state court properly assessed *Strickland* prejudice in the context of the totality of the trial proceedings, and correctly found that probative evidence supported the post-conviction court's determination. Question II of the Petition does not present an issue meriting the Court's review.

II. THE PETITION MISCHARACTERIZES THE RECORD.

Even if all the Commissioner's Petition says were accurate, there would, for the reasons stated above, be no question asserted that merits this Court's review. Some of the Commissioner's assertions that the state supreme court misapplied *Strickland*, however, stem from inaccurate or misleading characterizations of the record, which distort the Commissioner's argument. This is entirely so with respect to Question III, which argues that the court "misapplied" *Strickland* "when it considered an after trial change in reporting standards and a subsequently retained expert opinion . . . ." *See* Pet. at 25. Each of the Commissioner's misreadings warrants a brief explanation.

* The Commissioner claims, by turns, that the state court overlooked (Pet. at 11; *see* Pet. at 12) or erred in "consider[ing]" (Pet. at i, 25), a post-trial change in state protocol as the basis for Powell's testimony that he would now report the gunshot residue result as "inconclusive." The state court did not overlook this, but rather found that the protocol change was not germane. The court focused on Powell's recognition that the test results were *always* consistent with Ms. Coffey handling the gun and the fact that, "if counsel had asked, either prior to trial of at trial, Powell would have explained." 642 S.E.2d at 595 (Slip op. at 8).

* The Commissioner argues, similarly, that counsel was not deficient in failing to cross-examine Powell because "[n]o matter how clever the question, the state expert would not, indeed could not, have said the test was positive for gunshot residue." Pet. at 15. But the significance of the gunshot residue to the defense did not depend on a "positive" result: As the state supreme court found, 642 S.E.2d at 598-99 (Slip op. at 14), the jury could have found that Coffey's hand was on the gun when it fired, consistent with test results and Ard's account, despite the negative reported result. No state court, including the dissenting Justices in the South Carolina Supreme Court, has taken issue with the fact that Coffey handling the gun was consistent with Ard's defense.[21]

---

[21] In footnote 4, the Commissioner indicates that there was testimony at trial suggesting that the low levels of gunshot residue may have supported an argument that Ms. Coffey was "shot at." Pet. at 15 n.4. That is inaccurate, in two respects. First, the trial testimony of Powell (and that of White) confirmed that the quantity of gunshot residue particles is not an issue in determining the presence or absence of gunshot residue. App. 3803. "[N]ormally," Agent Powell stated, "you will have a small number [of particles]." App. 3803. Second, Powell testified that one would only expect lots of gunshot residue particles on the victim's hands if they were in front of the barrel when the gun fired. But Powell testified that in this case he could "rule out" the possibility that Ms. Coffey's hand was in front of the barrel of the gun. App. 3812. Further, that is not what Ard said transpired; Ard testified that Ms. Coffey had the gun in her hand. *See*

- Finally, the Commissioner asserts that the state supreme court erred in "consider[ing] . . . subsequently retained expert opinion." Pet. at 25. The state court expressly said that its determination was based on "the evidence available at the time of trial" and the testimony of the state's own expert, Powell, not the defense post-conviction expert. 642 S.E.2d at 599 (Slip op. at 15). This distinguishes the case from those the Commissioner cites for the proposition that "counsel is 'not required to shop for a more favorable expert,'" Pet. at 19 (quotation omitted).[22]

Question III of the Petition, which is based entirely upon these mischaracterizations, presents no question for the Court's review.

CONCLUSION

The Supreme Court of South Carolina's decision in this case involves a straightforward application of *Strickland v. Washington*. It does not conflict with the decision of another state court of last resort of a federal court of appeals. The Petition asserts no more than what it erroneously deems to be misapplication of a properly stated rule of law. For these reasons, and those set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

By: 

App. 2227-28. The Commissioner's assertion contradicts Powell's testimony and that of White, who both testified that the state's test results were consistent with the victim handling the gun as it was fired.

[22] The Commissioner also argues periodically that "establishing that the victim could have handled the weapon does not support Ard's testimony that clearly placed the gun in the victim's hand when it was fired . . . ." Pet. at 22; *see* Pet. at 14. This argument seems to defeat itself: surely establishing that "the victim *could have handled* the weapon" does support Ard's testimony that "placed the gun *in the victim's hand* when it was fired." The Commissioner conceives that Powell's testimony that grabbing a gun around the cylinder gap would cause injury, even tearing of the skin (*see* App. 2403-05), combined with Ard's statement that afterward his hand felt "numb" and that the firing left "little marks" that had gone away between the incident and the trial three years later, disproves Ard's statement that his hand was over the gun's cylinder gap. *See* Pet. at 24; *see* App. at 2227-28, 2262. At best, this provides a weak basis from which the jury could have drawn an inference against Ard's account. There was, however, no probative testimony at trial regarding the presence or absence of injury to Mr. Ard's hand contemporaneous to the incident or after he turned himself in three days later.

WILLIAM N. NETTLES*
Sanders & Nettles, LLC
Post Office Box 12005
Columbia, SC 29211
(803) 779-9966

CHRISTOPHER SEEDS
Cornell Law School
Myron Taylor Hall, Room 103
Ithaca, NY 14853
(607) 255-3805

* *Counsel of Record*

Attorneys for Respondent

Dated: August 7, 2007

No. 07-33

IN THE
SUPREME COURT OF THE UNITED STATES

JON OZMINT, Director,
South Carolina Department of Corrections,

Petitioner,

versus

JOSEPH LEE ARD

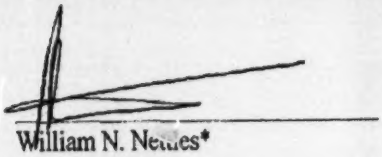
Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the Motion for Leave to Proceed *In Forma Pauperis*, the accompanying *In Forma Pauperis Declaration*, and the *Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of South Carolina* has been served upon counsel for Petitioner by depositing one copy of same in the United States Mail, postage prepaid, addressed as follows:

Melody J. Brown
Office of the Attorney General
PO Box 11549
Columbia, SC 29211
(803) 734-6305

This, the 8th day of August, 2007



William N. Nettles*
PO Box 12005
Columbia, SC 29211
(803) 779-9966